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Changing the Narrative: Sex Trafficking and Its Victims

I. INTRODUCTION

Human trafficking is currently the second most profitable criminal industry in the world,¹ trailing behind only drug trafficking.² This illegal industry racks in a staggering \$31.6 billion in profit per year,³ and the initial sale of a trafficked individual generates approximately \$7–12 billion.⁴ Human trafficking is also the fastest growing criminal industry in the world,⁵ and many scholars predict that soon it will surpass even drug trafficking as the most profitable criminal enterprise, as gangs are finding that it is more profitable to trade humans over drugs or guns.⁶ While experts debate how many individuals are currently being trafficked, most seem to settle on approximately forty million people worldwide.⁷ This means that there are more people in slavery today

1. *What Is Human Trafficking?*, U.S. DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Mar. 14, 2019).

2. KEVIN BALES & RON SOODALTER, *THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY* 3 (2009) (ebook).

3. Attorney General Sean Reyes, Speech for BYU Women (Jan. 9, 2016).

4. Anna Gekht, *Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings*, 37 DENV. J. INT'L L. & POL'Y 29, 31 (2008).

5. *Human Trafficking Is the World's Fastest Growing Crime. Here's How Hospitals Can Fight Back*, ADVISORY BOARD (May 22, 2017, 9:30 AM), <https://www.advisory.com/daily-briefing/2017/05/22/human-trafficking> (citing to a Department of Defense study that named human trafficking as the fastest growing crime in the world).

6. Reyes, *supra* note 3; see e.g. *How Street Gangs Make Big Money by Sex Trafficking 14-Year-Old Girls*, FIGHT THE NEW DRUG, (Sept. 27, 2018), <https://fightthenewdrug.org/california-gangs-cashing-selling-14-year-old-girls-sex/>; Carrie Johnson, *Gangs Enter New Territory with Sex Trafficking*, NPR (Nov. 14, 2011, 4:46 PM), <https://www.npr.org/2011/11/14/142300731/gangs-enter-new-territory-with-sex-trafficking>.

7. E.g., *Unraveling the Numbers*, GLOBAL SLAVERY INDEX, <https://www.globalslavery-index.org/2018/findings/highlights/> (last visited Mar. 14, 2019) (estimating there are 40.3 million people being trafficked); Mark Tutton, *40 Million Slaves in the World, Finds New Report*, CNN (Sep. 20, 2017, 9:57 AM), <https://www.cnn.com/2017/09/19/world/global-slavery-estimates-ilo/index.html>; *Forced Labour, Modern Slavery and Human Trafficking*, INT'L LAB. ORG., <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm> (last visited Mar. 14, 2019) (estimating 40.3 million trafficked individuals worldwide); Kevin Bales, *Why Brazil Leads the World in Fighting Slavery*, CNN (Oct. 18, 2013, 5:13 PM), <http://theccnnfreedomproject.blogs.cnn.com/category/the-facts/the-number/> (stating that thirty million is a conservative number).

than at any other point at time, and that there are more than twice as many people enslaved as there were in the entire 350 years of the Atlantic slave trade.⁸

While many people believe that human trafficking does not exist or only happens in Africa or Asia, human trafficking is unfortunately alive and thriving in every corner and state of the United States and every country in the world.⁹ In fact, the United States is a major “destination country for human traffickers,” and roughly 14,500 to 17,500 victims are trafficked *into* the United States from international borders each year.¹⁰ Nobody knows the exact number of individuals being trafficked in the world or in the United States, due to the clandestine nature of the crime; however, in 2010, leading scholar Kevin Bales said an extremely conservative estimate would be that at least 50,000 people are being trafficked within the United States.¹¹

While all forms of human trafficking are horrific and worth attention, this note will focus solely on sex trafficking, as victims of sex trafficking often endure more resistance to receiving assistance and are in many cases less likely to receive legal help. Federal law arguably offers protection for victims of sex trafficking and prohibits them from facing criminal charges. However, states frequently fail to appropriately apply enacted law to protect victims. As a result, many victims of sex trafficking have been charged and convicted of crimes they *committed* as a result of being trafficking victims.¹² For these reasons, scholars have

8. See BALES & SOODALTER, *supra* note 2. For an interesting look at how slavery in America has not ended and has constantly been in place in one form or another, read the first chapter of Bales’ book. *Id.* Also see Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT’L L.J. 207, 209 (2007), for more information about potential problems between comparing the transatlantic slave trade and the current epidemic of human trafficking or modern slavery.

9. *The Facts*, POLARIS, <https://polarisproject.org/human-trafficking/facts> (last visited Mar. 14, 2019).

10. Francisco Zornosa, *Protecting Human Trafficking Victims from Punishment and Promoting Their Rehabilitation: The Need for an Affirmative Defense*, 22 WASH. & LEE J. C.R. & SOC. JUST. 177, 180 (2016). See Toko Serita, *In Our Own Backyards: The Need for a Coordinated Judicial Response to Human Trafficking*, 36 N.Y.U. REV. L. & SOC. CHANGE 635, 636 (2012) (“The United States is considered a major destination country for traffickers, into which approximately 14,500–17,500 people are trafficked every year.”); BALES & SOODALTER, *supra* note 2, at 7. Bales notes that 17,000 individuals are murdered in the United States each year. *Id.* This is the same number as those who are trafficked, and yet, there are many more murder cases investigated than there are trafficking cases. *Id.*

11. BALES & SOODALTER, *supra* note 2, at 7.

12. Danielle (“Elle”) Augustson, Note, *Protecting Human-Trafficking Victims from Criminal Liability—A Legislative Approach*, 17 GEO. J. GENDER & L. 625, 642 (2016) (A twelve-year-old girl was convicted of prostitution in New York); Alyssa M. Barnard, Note, “*The Second Chance They Deserve*”: Vacating Convictions of Sex Trafficking Victims, 114 COLUM. L. REV.

discussed the need for safe harbor laws (laws that prevent victims from being charged), affirmative defense laws (laws that allow victims to be charged but to put on a defense as to why they are innocent), and vacatur laws (laws that allow for victims to have their records expunged) at the state level.¹³

While several legal scholars have articulated why states should adopt laws to protect victims of trafficking and have even suggested model rules for states to adopt, states are preeminently failing to enact adequate laws or to pass any laws at all that protect victims.¹⁴ However, none of these scholars have tackled why these laws are not being adopted and why these laws, if adopted, are being applied improperly.

These laws are not being passed because the public at large lacks an understanding of how sex trafficking operates in the United States, who victims of sex trafficking are and what they look like, and who is at risk of becoming a victim. The narrative surrounding trafficking victims is often one that is fueled by blaming the victim and questioning the veracity of the victim's claim of being trafficked. Until the narrative surrounding victims of sex trafficking changes, safe harbor, affirmative defense, and vacatur laws will not be adopted or will be adopted in a piece-meal or ineffective fashion. This note will explain (1) why states should pass safe harbor, affirmative defense, and vacatur laws to adequately protect victims of human trafficking and (2) how fixing misconceptions about victims of sex trafficking is crucial in accomplishing this goal. This note will be divided into four parts. Part One will explain how the current realities of human trafficking led to the passage of national and international laws that then trickled down into states passing similar laws. Part Two will then discuss safe harbor, affirmative defense, and vacatur laws, why they are needed, and the failings of each of these laws. Part Three will analyze how the misconceptions of and false narrative surrounding sex trafficking victims have stifled efforts to pass the laws discussed in Part Two. Part Four will suggest recommended changes that need to be implemented in order to properly protect victims of sex trafficking. This note will conclude by restating that through enacting and properly applying safe harbor, affirmative

1463, 1481–83 (2014) (Sheriff's office arrested a fifteen-year-old-girl and a sixteen-year-old-girl for prostitution even though this is in violation of United States federal law).

13. See Augustson, *supra* note 12; Barnard, *supra* note 12.

14. Christine Anchan, Note, *Protecting the Imperfect Victim: Expanding "Safe Harbors" to Adult Victims of Sex Trafficking*, 23 WM. & MARY J. WOMEN & L. 117, 137 (2016); Augustson, *supra* note 12, at 631; Barnard, *supra* note 12, at 1465–66.

14. Barnard, *supra* note 12, at 1465–66.

defense, and vacatur laws and changing the narrative surrounding victims of sex trafficking will allow for more protection of victims of trafficking within the United States.

II. CURRENT LANDSCAPE OF HUMAN TRAFFICKING AND HUMAN TRAFFICKING LAWS

Properly understanding what constitutes human trafficking and how the law has reacted to human trafficking offers enlightenment as to why states have been reluctant to pass laws that adequately protect victims of sex trafficking and why these laws, if passed, are frequently misapplied. This section will explain (a) what constitutes human trafficking and (b) the legal response to human trafficking, and in particular, sex trafficking, at the international and national level, as this framework has trickled down to the state level.

A. *What Constitutes Human Trafficking?*

To correct misperceptions of human trafficking, society must first be willing to acknowledge that human trafficking is a problem and have a greater understanding of what the term *human trafficking* means. Legally, in the United States, human trafficking is defined as the “act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion.”¹⁵ While there are many forms of human trafficking,¹⁶ the United States law predominantly focuses on two forms of human trafficking: labor and sex trafficking.¹⁷ It defines sex trafficking as “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”¹⁸ Labor trafficking is defined as the “recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the

15. U.S. DEP'T OF ST., TRAFFICKING IN PERSONS REPORT 29 (2014), <https://www.state.gov/documents/organization/226844.pdf>. Historically the definition of human trafficking did not always require force, fraud, or coercion. Augustson, *supra* note 12, at 631.

16. U.S. DEP'T OF ST., OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT (2008), <https://www.state.gov/j/tip/rls/tiprpt/2008/105377.htm>.

17. *See* 22 U.S.C. § 7102 (2000).

18. *Id.* § 7102(10).

purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”¹⁹

The term *human trafficking* can also be a slight misnomer as an individual does not need to “be physically transported between two locations, internationally or domestically, to be a victim of [human] trafficking.”²⁰ In many cases, people who are being trafficked are not transported out of their state, or in some rare cases, even out of their home. For example, in Utah one man was eventually arrested for sex trafficking approximately sixty young boys.²¹ After a friend of the attorney general noticed his son was acting strange after an after-school activity, he suspected trafficking and reported the tip to the attorney general.²² The attorney general acted on the tip and ultimately arrested the trafficker, who turned out to be an MS-13 gang member.²³ This story demonstrates the importance of the general public being aware of the signs of human trafficking and knowing how to respond after suspecting trafficking is occurring.

Without an adequate understanding that human trafficking can happen anywhere and to any family, people are not properly motivated to pass or apply laws correctly to protect victims of human trafficking, especially victims of sex trafficking. The United States Congress itself has offered the correct rationalization for protecting victims of human trafficking by stating that the Declaration of Independence “recognizes the inherent dignity and worth of all people” and reiterates the idea that “all men are created equal and . . . are endowed . . . with certain unalienable rights.”²⁴ Congress also states that “[t]he right to be free from slavery and involuntary servitude is among those unalienable rights.”²⁵ The existence of human trafficking in any form, sex trafficking or labor trafficking, is an “evil institution[] that must be abolished” and stands in direct contrast to the very principles this country was

19. *Id.* § 7102(9)(B).

20. Barnard, *supra* note 12, at 1465–66.

21. Alyssa Nielsen, *Utah Attorney General Reyes Shares Utah Cases of Human Trafficking*, DAILY UNIVERSE (Jan. 9, 2016), <http://universe.byu.edu/2016/01/09/utah-attorney-general-addresses-byu-about-human-trafficking/>; Pat Reavy & Sandra Yi, *Arrests Highlight ‘Prevalent’ Problem of Human Trafficking in Utah*, DESERET NEWS (Apr. 1, 2014, 5:32 PM), <https://www.deseretnews.com/article/865599989/Arrests-highlight-prevalent-problem-of-human-trafficking-in-Utah.html>.

22. See Nielsen, *supra* note 21; Reavy & Yi, *supra* note 21.

23. *Id.*

24. 22 U.S.C. § 7101 (2000).

25. *Id.*

founded upon.²⁶ And yet, human trafficking still exists within every state of the United States.²⁷

Of the forty million victims of trafficking worldwide,²⁸ at least 4.8 million of them are victims of sex trafficking.²⁹ While the traditional narrative is to speak of victims of sex trafficking as being female, this is an inaccurate reality, as demonstrated in the case in Utah where sixty boys were being victimized by one trafficker.³⁰ Sex trafficking victims come from all walks of life, all genders, and all ages.³¹ Eighty percent of people trafficked within the United States were first sold for sex before the age of eighteen.³² The average age females enter the sex trafficking industry is between twelve and fourteen; for males, the average age is between eleven and thirteen.³³ However, some people purport to have entered the market as young as the age of four.³⁴

The reality of sex trafficking is a stark and bleak world with few success stories. However, too often governments, the media, and society—if they choose to engage in a discussion about sex trafficking—focus on a prosecutorial approach or sting operations instead of a victim-centered approach.³⁵ The media inundates the narrative with daring rescues of victims and arrests of traffickers, but does little to engage in conversations about what happens after victims of human trafficking are *rescued*.³⁶ Too often, victims face blame and judgment, and people

26. *Id.*

27. *The Facts*, *supra* note 9.

28. See *supra* text accompanying note 7 for a discussion of how many victims of trafficking currently exist worldwide.

29. *Forced Labour, Modern Slavery and Human Trafficking*, *supra* note 7. Of the estimated 24.9 million people being trafficked for labor, about 4.8 million are being trafficked in forced sexual exploitation (sex trafficked). *Id.*

30. Nielsen, *supra* note 21; Reavy & Yi, *supra* note 21.

31. See BALES & SOODALTER, *supra* note 2, at 6.

32. See Barnard, *supra* note 12, at 1466 n.12. These estimates are especially concerning because under federal law, minors who are engaged in the sex industry are automatically considered victims of severe sex trafficking. See 22 U.S.C. § 7102(9)(A) (2000) (defining “severe forms of trafficking in persons” to include “sex trafficking in which . . . the person induced to perform such act has not attained 18 years of age.”).

33. Barnard, *supra* note 12, at 1467 n.13.

34. *Id.* at 1467 n.15.

35. *E.g. Huge Florida Sex Trafficking Sting Results in Nearly 50 Arrests and 200 Warrants, with More Still Coming*, WMBF NEWS (Feb. 22, 2019, 2:35 PM), <http://www.wmbfnews.com/2019/02/22/huge-florida-sex-trafficking-sting-results-nearly-arrests-warrants-with-more-still-coming/>; Pat Reavy, *Former Utah Vice Squad Lieutenant Arrested in Prostitution Sting*, KSL.COM (Feb. 20, 2019, 8:37 PM), <https://www.ksl.com/article/46495111/former-utah-vice-squad-lieutenant-arrested-in-prostitution-sting>.

36. *Huge Florida Sex Trafficking Sting*, *supra* note 35; Reavy, *supra* note 35.

question whether they legitimately were victims of human trafficking or are just using trafficking as an excuse to avoid prostitution charges.

Furthermore, individuals sometimes believe that human trafficking is not as prevalent of a problem as it really is. Leading scholar Kevin Bales said that less than one percent of trafficking cases are ever solved, and many of these are not formally presented as trafficking cases.³⁷ Prosecutors also often charge traffickers with a lesser crime than human trafficking because it is an easier case to prove and it protects victims of human trafficking from having to testify against their traffickers, which can be frightening for the victims.³⁸ Consequently, many trafficking cases are never identified as such.³⁹ These misconceptions that there are no real victims of sex trafficking or that sex trafficking cases are a rarity are impediments in passing adequate state laws and ensuring that the laws that are passed are being applied correctly.

B. International and National Laws on Human Trafficking and Its Influence on State Laws

The international and national laws on human trafficking have had a profound impact on states that have passed laws on the subject. Thus, understanding the historical and legal backdrop of human trafficking is crucial to understanding why states have failed to pass laws on the subject or have passed inadequate laws to protect victims of sex trafficking. International and national legislative bodies have focused primarily on prosecuting traffickers and not on protecting victims.⁴⁰ Focusing on prosecution rather than protecting victims is an approach mirrored by the states' legislation. However, as this note will discuss, this approach is deeply problematic and is symptomatic of the incorrect narrative surrounding sex trafficking.

Although human trafficking is not a new problem, the international and national response to the problem has been rather recent. Consequently, governments have only recently begun to recognize the scale of human trafficking's reach. In 2000, the international community passed the Palermo Protocol, an international treaty that provides protection for victims and criminalizes trafficking.⁴¹ This marked one

37. BALES & SOODALTER, *supra* note 2, at 7; Reyes, *supra* note 3.

38. Reyes, *supra* note 3.

39. See Nielsen, *supra* note 21; Reavy & Yi, *supra* note 21.

40. G.A. Res. 55/25 (Nov. 15, 2000); 22 U.S.C. § 7101 *et. seq.*

41. Augustson, *supra* note 12, at 629.

of the first times the international community addressed the problem of human trafficking.⁴² The Palermo Protocol defines trafficking in persons broadly to include:

recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁴³

However, the Palermo Protocol focused primarily on punishing traffickers rather than developing ways to help victims of human trafficking.⁴⁴ The Palermo Protocol did encourage “[s]tates to protect the privacy and identity of the victims ‘to the extent possible,’ to ‘consider implementing measures’ providing victims with recovery programs, and to ‘endeavor’ to protect the physical safety of trafficking victims.”⁴⁵ However, as one scholar states, “[t]he strong language used in other areas of the Palermo Protocol, including the criminalization and prevention of human trafficking, simply did not extend to protecting victims.”⁴⁶

That same year, 2000, the United States passed the Trafficking Victims Protection Act (TVPA).⁴⁷ Under the TVPA, sex trafficking must be proven by showing (1) that there was force, fraud, or coercion or (2) that an individual under the age of 18 was involved.⁴⁸ In addition, the TVPA also explicitly calls for the United States to prioritize prosecuting trafficking offenses and to “protect[] rather than punish[] the victims of such offenses.”⁴⁹ The TVPA recognized human trafficking in the United States by enacting penalties for traffickers and providing services for human trafficking victims; however, the focus was largely on international causes for human trafficking.⁵⁰ By the mid-2000s, the United States was a prominent figure in the fight against international human trafficking, yet Congress and the United States

42. *Id.*

43. G.A. Res. 55/25, *supra* note 40.

44. Augustson, *supra* note 12, at 629.

45. *Id.* at 630 (citing G.A. Res. 55/25, *supra* note 40).

46. *Id.* at 269.

47. 22 U.S.C. § 7101 (2000).

48. *Id.* § 7102(9).

49. *Id.* § 7101 (24).

50. *Id.* (quoting Trafficking Victims Protection Reauthorization Act of 2005, 22 U.S.C. § 7101 (2006)).

had done little to evaluate or combat trafficking within the States.⁵¹ For example, the United States began publishing an annual Trafficking in Persons Report in 2000 where the Department of State judges countries' efforts to combat human trafficking.⁵² However, it was not until the 2010 Trafficking in Persons Report that the United States evaluated its own progress in combatting human trafficking.⁵³

Furthermore, while the TVPA was a crucial step in preventing human trafficking, "it did not provide sufficient protection or services for victims."⁵⁴ At the same time, advocates for better human trafficking laws urged the United States to take more action, alleging the state-level criminal justice system was treating "United States citizens qualifying under the federal definition of 'human trafficking victim' as criminals by prosecuting them for prostitution."⁵⁵ These advocates also noted the "irony that the United States was so concerned about trafficking in other countries, but was neglecting trafficking of its own citizens."⁵⁶ For instance, the TVPA forbids other countries from inappropriately incarcerating victims of trafficking for unlawful acts directly resulting from being trafficked.⁵⁷ However, no action was being taken domestically to prevent that very same act from occurring within the states.⁵⁸ Under the TVPA, Congress defines one *severe form of human trafficking* as any minor engaged in prostitution.⁵⁹ When a minor is involved, the law does not require a show of force, fraud, or coercion and automatically considers the minor to be a victim of a crime not a perpetrator of one.⁶⁰ However, states all too often criminally

51. Carrie N. Baker, *The Modern Development of Homegrown Creative Justice: The Influence of International Human Trafficking on United States Prostitution Laws: The Case of Expungement Laws*, 62 SYRACUSE L. REV. 171, 176 (2012).

52. *Id.*

53. *Id.* (citing to U.S. DEP'T OF ST., OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT (2010), <https://www.state.gov/j/tip/rls/tiprpt/2010/>).

54. Augustson, *supra* note 12, at 631.

55. Baker, *supra* note 51, at 171.

56. *Id.*

57. *Id.* at 171–72. The TVPA states that federal governments should: "ensure[] that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, [and should provide] training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims." Jessica Emerson & Alison Aminzadeh, *Left Behind: How the Absence of a Federal Vacatur Law Disadvantages Survivors of Human Trafficking*, 16 U. MD. L.J. RACE RELIG. GENDER & CLASS 239, 249 (2016) (quoting 22 U.S.C. § 7106(b) (2012)).

58. Baker, *supra* note 51, at 171–72; Emerson, *supra* note 56.

59. See Augustson, *supra* note 12, at 632; Barnard, *supra* note 12, at 1481–83.

60. *Id.*

charge and convict minors of prostitution.⁶¹ This is alarming since the TVPA states that “[v]ictims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.”⁶²

Unfortunately, these sorts of proscribed scenarios frequently occur nationwide. While the United States recently passed the Justice for Victims of Trafficking Act (JVTA) of 2015,⁶³ which built upon the TVPA and expanded the services and assistance that child victims of trafficking could receive,⁶⁴ the JVTA is a temporary law that is currently set to expire on September 30, 2019 unless Congress renews it.⁶⁵ Furthermore, the JVTA currently offers no protection to adult victims.⁶⁶ The international and national legal framework that surrounds trafficking trickled down to the state level and had a significant impact on state trafficking laws.

III. DEVELOPMENT OF STATE LAWS PROTECTING VICTIMS

In the last decade, several states have adopted laws to protect victims of human trafficking. State regulations on trafficking, as one scholar stated, attempt to “bring . . . states into compliance with federal and international legal standards.”⁶⁷ Consequently, states have passed safe harbor, affirmative defense, and vacatur laws. Many states, however, have refused to pass these laws, and states that have passed these laws have done so in a precursory, flawed way. Thus, these laws are not very effective. Additionally, many of these laws are frequently misapplied. Although many scholars have proposed excellent model rules that states can adopt, these laws are still met with public resistance due to misconceptions concerning whether they are even necessary and who is deserving of protection. The following three subsections will analyze the current status of safe harbor, affirmative defense, and vacatur laws within the United States. Namely, these subsections

61. *Id.*

62. 22 U.S.C. § 7101(b)(19) (2000).

63. Pub. L. No. 114-22, 129 Stat. 227 (2015); S. 178, 114th Cong. (2015) (enacted).

64. *Id.*

65. *Id.*

66. *Id.*

67. Baker, *supra* note 51, at 180–81.

will discuss why these laws are important and the changes that need to occur if these laws are to be implemented correctly.

C. Safe Harbor Laws

Theoretically, safe harbor laws grant immunity to minors who are victims of sex trafficking.⁶⁸ They differ from affirmative defense laws, as under a safe harbor laws no trial occurs and no charges result.⁶⁹ Safe harbor laws recognize that individuals engaged in the commercial sex industry are victims and that “resources should be directed toward helping [victims] escape prostitution instead of criminalizing them.”⁷⁰ If individuals are victims of sex trafficking, then safe harbor laws should kick in, and they should not be charged with a crime. Safe harbor laws at the state level create a *de facto* presumption that minors are being sexually exploited and are victims of human trafficking and should not be convicted or charged for any crime.⁷¹ As one scholar stated, safe harbor laws are logical since “trial is unnecessary because a child who cannot consent to sexual intercourse [legally] would always” be able to get the charge dismissed in an ideal judicial system.⁷² In most states, safe harbor laws work by diverting children involved with the commercial sex industry “away from criminal prosecution” into social services.⁷³ One twelve-year-old girl, who was erroneously arrested for prostitution, said, “I was arrested for prostitution, and put in jail. The John [buyer of sex] was released. I was sentenced and sent upstate for a year. He was sent to a special school [for a couple of evenings], and his case was dismissed. There was no school for me.”⁷⁴ This situation is all too common and is what safe harbor laws are designed to remedy. The breadth and depth of safe harbor laws differ depending on the individual state. Typically, however, safe harbor laws protect only minors and not adults.

68. See Augustson, *supra* note 12, at 642. Conversely, under affirmative defense laws, there is a trial and a charge is brought. See *infra* Part II.B.

69. *Id.*

70. Anchan, *supra* note 14, at 137.

71. Augustson, *supra* note 12, at 641.

72. *Id.*

73. Baker, *supra* note 51, at 178–79.

74. Augustson, *supra* note 12, at 642. The term “John” is frequently used in the industry to refer to buyers of sex.

Current safe harbor laws have two main problems: (1) they have not been universally passed, and (2) they create an arbitrary sort of justice by drawing a bright-line of protecting trafficked individuals who are rescued while under a certain age, typically eighteen. First, safe harbor laws have not been universally passed. The passage of safe harbor laws is rather recent. New York adopted the first safe harbor law in 2008.⁷⁵ As of 2016, at least thirty-four states had adopted safe harbor laws for minors.⁷⁶ These state laws differ as to what the threshold age is for safe harbor laws to apply. For example, some states have adopted safe harbor for those under age eighteen, others only allow safe harbor for those under sixteen, and other states impose additional requirements upon minors for them to receive assistance. For instance, New York only applies safe harbor to first-time offenders.⁷⁷ However, several scholars such as Christine Anchan have argued that safe harbor laws should extend to adults too. She recognized that for this to happen it would “require[] a cultural shift toward sensitivity regarding the complex factors that lead individuals into the commercial sex industry, instead of judgment.”⁷⁸ However, like other scholars, Anchan failed to discuss what that cultural shift would entail.

Second, even when safe harbor laws have been passed, they create an arbitrary line of justice that predicates who will receive the benefit of safe harbor laws on when the victims were rescued and not when they first were trafficked. Most victims of human trafficking are victimized between the ages of twelve and fourteen for females, and between eleven and thirteen for males.⁷⁹ However, current laws do not recognize this reality. If a child who was first trafficked at twelve is rescued at the age of fifteen, he or she is likely to be recognized as a victim of human trafficking and not be convicted of a crime. But if this same child is not rescued until age nineteen, then he or she is often treated as a criminal and not afforded any protection under the law. This represents the problem of current safe harbor laws. Current safe harbor laws are not based in logic or backed by data and result in misjustice. While all victims of human trafficking should not be criminalized under the law, at the very least, those who can show they were trafficked while still a minor should benefit from safe harbor laws.

75. Baker, *supra* note 51, at 178–79.

76. *Id.*

77. *Id.* at 179.

78. Anchan, *supra* note 14, at 131.

79. Barnard, *supra* note 12, at 1466 n.13.

If states are not prepared to offer safe harbor laws to adults, they should at least consider offering safe harbor for victims of human trafficking who can prove they were first trafficked while a minor.

Although passing safe harbor laws that protect minors may seem uncontroversial, even these safe harbor laws face criticism and backlash. Critics of passing safe harbor laws argue they will allow individuals to engage in commercial sex willingly with impunity. But children cannot legally consent to having sex and are automatically considered victims of severe trafficking,⁸⁰ which undermines this argument. Additionally, there is rarely a similar outcry for punishment of the individuals buying sex, which demonstrates an inordinate focus on individuals who are being trafficked rather than on the buyers of the traffickers. Therefore, it is logical for states to pass safe harbor laws. Slightly modifying safe harbor laws also alleviates the concern that people, including adults, will misuse the law. For example, Wyoming's law states, "A victim of human trafficking is not criminally liable for any commercial sex act or other criminal acts committed as a direct result of, or incident to, being a victim of human trafficking"⁸¹ Wyoming's law does not protect adults who willfully or voluntarily engage in the commercial sex industry. Rather, these adults must still offer sufficient proof they were trafficked. This law is a middle ground approach, but one that still protects adults and children alike who have been trafficked. While Wyoming's approach does not adequately protect all victims of human trafficking, it still provides some level of protection to victims of human trafficking by recognizing that victims are often charged with lesser crimes or crimes other than prostitution while they are being trafficked. Although the Wyoming law does not measure up to model rules proposed by legal scholars, it is currently one of the most effective safe harbor laws.⁸²

Additionally, critics who oppose implementing safe harbor laws argue that an effective legal framework poses tremendous challenges.⁸³ Those who support safe harbor laws agree that they are currently "underfunded and thus ineffective" and are often "incomplete," meaning they lack training and diversion programs.⁸⁴ While more states are

80. See 22 U.S.C. § 7102(9)(A) (2000); Augustson, *supra* note 12, at 632; Barnard, *supra* note 12, at 1481–83.

81. WYO. STAT. ANN. § 6-2-708(a) (West 2013).

82. For a discussion of ideal model rules, see Barnard, *supra* note 12.

83. *Id.*

84. Augustson, *supra* note 12, at 642 (internal quotations omitted).

passing safe harbor laws each year, there is still “resistance to [what] . . . could be viewed as giving offenders a free pass.”⁸⁵ Proponents of safe harbor laws for minors state that “[c]riminal law already provides the underlying rationale for ‘safe harbor’ provisions that would protect child[ren] . . . from criminal liability.”⁸⁶ Every state has passed legislation forbidding adults from having sexual intercourse with a minor “because, by law, children cannot consent to sexual acts.”⁸⁷ And yet, children are not protected from being prosecuted for engaging in the commercial sex industry, despite the fact that they cannot legally consent to have sex.

Despite these shortcomings, passing safe harbor laws is a good balance between ensuring individuals cannot freely participate in the commercial sex industry and protecting victims. Passing safe harbor laws is also one method that states have managed to garner enough support to pass *any* laws that protect human trafficking victims. But the mere passage of safe harbor laws does not adequately protect victims. Safe harbor laws have their fallbacks but affording some protection to victims of human trafficking is better than having none at all. Finally, states should pass safe harbor, affirmative defense, and vacatur laws if the state is unwilling to grant universal and broad safe harbor that protect all victims. Passing all three types of these laws brings states into compliance with directives of the TVPA and protect victims in different ways.

D. Affirmative Defense Laws

Affirmative defense laws allow victims of human trafficking who have been charged with prostitution to defend themselves at trial by proving they were victims of human trafficking.⁸⁸ Compared to safe harbor laws, which prevent victims from being charged with a crime in the first place,⁸⁹ affirmative defense laws are not as preferable as safe harbor laws,⁹⁰ especially for children or minors who legally cannot consent to having sex and should not be forced to endure a trial in the

85. Anchan, *supra* note 14, at 138.

86. Augustson, *supra* note 12, at 637.

87. *Id.*

88. Cassandra P. Lawrenson, Note, *The Injustice of Convicting Sex Trafficking Victims: A Model Vacating Convictions Law*, 36 T. JEFFERSON L. REV. 343, 344 (2014).

89. See Augustson, *supra* note 12, at 642.

90. See *supra* Part II.A. for a discussion of Safe Harbor Laws.

first place. However, affirmative defense laws are still essential, especially if safe harbor laws have not been passed. Currently, approximately twenty-two states have adopted prostitution specific affirmative defenses.⁹¹ Again, like safe harbor and vacatur laws, the enacted laws are often flawed because they ignore the reality of trafficking victims. Current affirmative defense laws usually only apply to the crime of prostitution and do not cover other associated crimes such as “crimes against nature, loitering, vagrancy, disorderly conduct, drug possession, and resisting arrest.”⁹² Victims are often charged for these types of crimes and affirmative defense laws do not cover these crimes.⁹³ This narrow reach is inadequate to protect victims. Also, many victims fail to identify as victims of human trafficking and never relay this information to their lawyer, which lessens the efficacy of affirmative defense laws. If an attorney does not recognize an individual as a trafficking victim, then this defense will not be utilized.

However, for those who cannot support safe harbor laws, affirmative defense laws are often seen as a stepping stone to protect individuals who have been trafficked.⁹⁴ While affirmative defense laws (without safe harbor or vacatur laws) are not necessarily sufficient to protect victims from being convicted of crimes due to being victims of trafficking, affirmative defense laws specific to human trafficking allow victims of trafficking to provide a defense whereas traditional duress laws fail to do so.⁹⁵ Even though many advocates of human trafficking victims prefer safe harbor laws, affirmative defense laws are still a crucial part of protecting human trafficking victims.

E. Vacatur Laws

Another remedy that exists for victims of human trafficking is vacatur laws. Vacatur laws allow victims of human trafficking who have been wrongfully charged with prostitution to clear their records if they can offer sufficient proof they were victims of sex trafficking.⁹⁶ Similar to safe harbor laws, vacatur laws that are specifically designated for human trafficking victims are relatively new. New York was the first state

91. Anchan, *supra* note 14, at 127–28.

92. Lawrenson, *supra* note 86, at 359–60.

93. See Zornosa, *supra* note 10, at 198; Lawrenson, *supra* note 86, at 344.

94. Anchan, *supra* note 14, at 133.

95. For more information, see Augustson, *supra* note 12.

96. Baker, *supra* note 51, at 179–80.

to pass a vacatur law in 2010.⁹⁷ In addition, between 2010 and 2013, fourteen states enacted similar laws, and from 2013 to 2015, an additional eleven states passed vacatur laws for human trafficking-related convictions.⁹⁸ Now approximately thirty-five states that have enacted vacatur laws, with more states considering these laws each year.⁹⁹

Vacatur laws work by allowing survivors of human trafficking to file a motion with a court to have their convictions removed, typically only for convictions for prostitution. When the court grants such a motion to vacate a conviction, it is admitting that an error has been made and the conviction is reversed.¹⁰⁰ Effective vacatur laws: (1) do not impose time limitations on when a victim can vacate a prior conviction, (2) vacate all nonviolent offenses that are related to their status as a victim of trafficking, (3) permit a wide range of evidence to show that he or she was a victim when the crime was committed, and (4) require the court to vacate a trafficking victim's conviction upon finding that the crime was a result of human trafficking.¹⁰¹

Presently, approximately ten states limit vacatur to prostitution offenses only,¹⁰² and many states impose time limitations, documentation limitations, or other limitations which make vacatur laws even more difficult to use for victims.¹⁰³ Limiting vacatur laws to prostitution offenses is especially problematic because victims of sex trafficking are frequently arrested for "crimes against nature, loitering, vagrancy, disorderly conduct, drug possession, and resisting arrest."¹⁰⁴ Consequently, the current vacatur laws do not apply to many people who have been wrongfully convicted of crimes associated with their status as a victim of sex trafficking. Several state vacatur laws are difficult for victims to use because they offer little guidance as to what evidence is acceptable to prove they were victims of sex trafficking.¹⁰⁵ Instead, victims should be allowed to support their motion for vacatur with a broad range of evidence to show their past victimization because a "reviewing court is certainly capable of distinguishing between a motion

97. Emerson & Aminzadeh, *supra* note 56, at 242.

98. *2013 Analysis of State and Human Trafficking Laws*, 1 POLARIS 54, 17 (2017), <https://polarisproject.org/sites/default/files/2013-State-Ratings-Analysis.pdf>.

99. *See id.*; Emerson & Aminzadeh, *supra* note 56, at 242.

100. Anchan, *supra* note 14, at 128.

101. Lawrenson, *supra* note 86, at 357.

102. *Id.*

103. *Id.*; Barnard, *supra* note 12, at 1494–95.

104. Lawrenson, *supra* note 86, at 359–60.

105. Barnard, *supra* note 12, at 1488–89.

that is supported by little, but credible, evidence, and a motion that is frivolously brought.”¹⁰⁶ Again, these victims have already served time or paid fines related to their offenses. Also, the majority of prostitution convictions do not involve trials, so “respect for the sanctity of a jury verdict is not a consideration in such cases” and supports allowing vacatur.¹⁰⁷ We should err on the side of allowing for vacatur of sentences, as more likely than not those engaged in the commercial sex industry are victims and deserving of a second chance.¹⁰⁸

Even more troubling is the fact that approximately eight states limit the time a victim has to petition a court for vacatur. For example, in Hawaii, a person must file within six years.¹⁰⁹ However, “[a]llowing a victim to bring a motion to vacate at any time does not harm society because courts can still deny frivolous motions, and because the benefits of a vacating convictions law outweigh any increase in the use of court resources.”¹¹⁰ Victims of trafficking may wait to file motions to vacate because they lack knowledge of the availability of such laws, lack the resources necessary to file vacatur motions, or are afraid of their traffickers and do not dare to make such an attempt.¹¹¹ Alternatively, for many, the consequences of a prostitution-related conviction may not affect them right away. For example, one victim of human trafficking only discovered years after leaving the industry that she had charges due to her status as a trafficking victim that greatly impeded her job searching and made it near impossible to obtain any employment.¹¹² Unfortunately, by that point, the time limitation for bringing a vacatur claim had passed, leaving her without any effective remedy.¹¹³ Supporters of vacatur laws claim that victims of human trafficking are often “saddled with a criminal record” that then “block[s] [them] from decent jobs and other prospects for rebuilding their lives. Even after they escape from sex trafficking, the criminal record victimizes them for life.”¹¹⁴ Criminal records can negatively affect an individual’s ability to find public and private housing and other essential benefits. Even

106. Lawrenson, *supra* note 86, at 363.

107. Barnard, *supra* note 12, at 1494–95.

108. See *infra* Part III.

109. HAW. REV. STAT. § 712-1209.6(2)(c) (2013).

110. Lawrenson, *supra* note 86, at 359.

111. Barnard, *supra* note 12, at 1487–88.

112. This account comes from a personal conversation the author had with a survivor of trafficking.

113. *Id.*

114. Lawrenson, *supra* note 86, at 344.

an individual's family rights are compromised by convictions, as criminal convictions can be used as evidence that a parent is unfit in a custody dispute. It can also pose an obstacle to immigration.¹¹⁵ For these reasons, time limits on when a victim can bring a vacatur motion should be abolished.

Vacatur laws are a crucial tool to help empower survivors and help them reintegrate into society. Even states that pass either safe harbor laws¹¹⁶ or affirmative defense laws¹¹⁷ or pass both should also pass vacatur laws, as all too often victims of human trafficking fall through the cracks and are charged with crimes. Passing vacatur laws is a strong signal that "victims of trafficking should not be criminalized for actions they were forced to commit."¹¹⁸ However, vacatur laws alone do not adequately protect victims of human trafficking. Victims who bring such motions have already served the punishment for the *crime* for which they were convicted.¹¹⁹ This is troubling because victims should not be convicted of crimes they were forced to engage in. However, despite the failings of vacatur laws, vacatur laws remain essential and are an easier sell to a public who may be wary of letting perceived criminals go free.¹²⁰

Of great concern is the reality that victims of sex trafficking rarely use vacatur laws.¹²¹ For example, four years after passing New York's vacatur law only thirty-eight sex trafficking victims had received vacatur relief.¹²² The number of people who have successfully vacated sentences compared to the tens of thousands of victims who could be eligible for relief is disheartening to say the least.¹²³ One scholar suggested this disparity is in large part due to the obstacles contained in the laws themselves, which require a high burden to overturn wrongful convictions and often time limitations and evidence restrictions; she also stated that lack of knowledge about these laws and inability to find lawyers willing to bring such motions also limits the number of people who bring these motions.¹²⁴

115. Barnard, *supra* note 12, at 1487–88.

116. *See supra* Part II.A.

117. *See supra* Part II.B.

118. Emerson & Aminzadeh, *supra* note 56, at 242.

119. Lawrenson, *supra* note 86, at 362.

120. Anchan, *supra* note 14, at 129.

121. Barnard, *supra* note 12, at 1483–84.

122. *Id.*

123. *Id.*

124. *Id.*

Thus, while vacatur laws are necessary to protect victims, current vacatur laws must be modified if they are ever to properly provide any real sense of protection for victims. Also, lawyers and the justice system need to do a better job of alerting potential victims to this potential remedy and walking them through the process. Victims do not always identify themselves as victims in time, and often prosecutors and law enforcement fail to make these identifications in time for safe harbor laws or affirmative defense laws to apply, which is why vacatur laws are crucial. Prosecutors and law enforcement should take great effort to identify potential victims early in the criminal justice process, which would hopefully make vacatur laws moot. However, until that happens, vacatur laws are essential. Additionally, as many states only pass safe harbor laws for victims who are still minors, affirmative defense laws are still crucial as they at least provide some measure of protection for victims. If a state could pass a safe harbor law prohibiting any victim of trafficking from being charged, then safe harbor laws and vacatur laws would be sufficient. However, due to the reluctance of the public to extend this law to adult victims, affirmative defense laws should be proposed as a middle ground that is better than no protection at all.

IV. VICTIMOLOGY: UNDERSTANDING HUMAN TRAFFICKING'S VICTIMS

While several scholars have proposed what ideal safe harbor, affirmative defense, and vacatur laws should look like and why these laws should be passed, the reality is (1) these laws are not being universally passed, although more states are beginning to pass these laws, (2) if these laws are passed, they are unhelpful because they do not provide adequate protection for victims of trafficking or ignore the realities of trafficking, and (3) victims are not being notified of these laws and are not using them.¹²⁵ Scholars have for the most part failed to adequately address what measures need to be taken to either pass new laws or modify existing laws to help victims access these laws. There are several steps that must be taken for these laws be modified, passed, used, and applied correctly.

The narrative surrounding victims of sex trafficking must be changed if these laws are to be passed and if they are to be effective. As the section immediately below will discuss, misconceptions abound

125. See Barnard, *supra* note 12, at 1483–84.

about who victims of human trafficking are and what the crime of trafficking looks like. Even more importantly, several people are ignorant of the fact that human trafficking is even happening in their state. Thus, until the public is educated about human trafficking and its realities, it will be hard to find state legislators willing to sponsor such bills.

A. Understanding Who Is at Risk of Becoming a Victim of Sex Trafficking and Correcting Misconceptions About Who Victims Are

Finding victims is easy for traffickers to do. A former trafficker was asked: “How did you know that you were going to be able to successfully traffic somebody?” He responded by saying something like:

It’s simple. You don’t need to look for a particular race, a particular social or economic class, or anything like that. You only need to look for one thing. I would go to a mall and look for a group of teenage girls, and I would tell them they were beautiful. If they looked down and avoided eye contact, then I knew I had them. I knew I was going to be able to traffic them.¹²⁶

This story demonstrates how important it is for the general public to understand how trafficking operates in their states and what victims of trafficking look like. Due to misconceptions or lack of knowledge of what victims of sex trafficking look like, victims often fall through the cracks of the judicial system and face unwarranted public condemnation, even though there are federal laws and even state laws meant to protect victims of sex trafficking. Society often does not believe that there are real victims of trafficking, and the misconceptions about what a victim looks like stifles efforts to pass laws designed to protect them and inhibits correct application of laws that are passed. Until society, future prosecutors, future defense attorneys, judges, and legislators understand the victimology of sex trafficking, adequate laws will not be passed or applied correctly. Consequently, this section will discuss the victimology of sex trafficking and the misconceptions sur-

126. This was presented at an event the author attended and reported on in July of 2015. Lynette Widdison gave the presentation and recounted her experiences talking to this trafficker. For more information about this event, see Danica Baird, *BYU club raises human trafficking awareness*, DAILY UNIVERSE (July 2, 2015) <https://universe.byu.edu/2015/07/02/byu-club-raises-human-trafficking1-awareness/>.

rounding who is a victim of sex trafficking and why these perceptions are so stifling.

While victims of human trafficking transcend all genders, races, socioeconomic statuses, religions, and ages, statistically several demographics are at higher risk of becoming victims of human trafficking: immigrants, youth (especially homeless youth or runaways), those who have previously suffered abuse, and the poor.¹²⁷ Congress states that at any given time, “as many as 300,000 children in the United States are at risk for commercial sexual exploitation”¹²⁸ Three hundred thousand people equates the same number as the discrete population of each of these cities: St. Louis, Missouri; Toledo, Ohio; and Anaheim, California.¹²⁹ This number is staggering and is an indication of our failure to protect children from sexual exploitation. Congress further states that between 1,300,000 and 2,800,000 runaway and homeless children live on the streets and that one out of every seven children will run away from home before the age of eighteen.¹³⁰ Other scholars suggest that 2.4 million children run away from home each year and that one out of three homeless teens are lured into prostitution within forty-eight hours of leaving home.¹³¹ This means they predict that at least 800,000 runaway children are being lured into sexual exploitation every single year.

Those who have suffered abuse are even more likely to be lured into the human trafficking trade.¹³² Eighty percent of runaway and

127. U.S. DEP’T OF ST., TRAFFICKING PERSONS REPORT 352 (2015), <https://www.state.gov/documents/organization/245365.pdf>; *The Victims & Traffickers*, POLARIS, <https://polaris-project.org/victims-traffickers> (last visited Mar. 14, 2019).

128. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–164, § 2, 119 Stat. 3558, 3558 (2006) (emphasis added); 22 U.S.C. § 7101 (2000).

129. *United States Census 2010 Interactive Population Map*, U.S. CENSUS BUREAU, <https://www.census.gov/2010census/popmap/> (last visited Mar. 14, 2019).

130. 22 U.S.C. § 7101 (2000).

131. *Case Campaign Against Sexual Exploitation*, NAT’L DISTRICT ATTORNEY’S ASSOCIATION, <https://ndaa.org/programs/child-abuse/case/> (last visited Mar. 15, 2019). Some scholars put this number at somewhere between 1.6 and 2.8 million youth that run away each year. Heather Hammer, David Finkelhor & Andrea J. Sedlak, *Runaway/Thrunaway Children: National Estimates and Characteristics*, 1 U.S. DEP’T OF JUST. 11, 7–9 (2002), <https://www.ncjrs.gov/pdffiles1/ojdp/196469.pdf>.

132. For example, one Las Vegas shelter for youth found that seventy-one percent “of domestic minor sex trafficking victims had been sexually abused.” Linda A. Smith, Samantha Healy Vardaman & Melissa A. Snow, *The National Report on Domestic Minor Sex Trafficking: America’s Prostituted Children*, 1 SHARED HOPE INT’L 1, 31–32 (2009), https://sharedhope.org/wp-content/uploads/2012/09/SHI_National_Report_on_DMST_2009.pdf. In 2013, a New York provider of services for homeless youth stated that one in four homeless youth had been a victim of sex trafficking or had engaged in survival sex. Covenant House, *Homelessness, Survival Sex*

homeless girls report that they have been sexually or physically abused.¹³³ Thirty-four percent report being sexually abused before leaving home, and forty-three percent report being physically abused after leaving home.¹³⁴ One study proposes that at least nine percent of runaway youth in a 1,600 sample reported engaging in survival sex at some point in their lives.¹³⁵ Ten percent of shelter youth and twenty-eight percent of street youths reported engaging in survival sex, as opposed to four percent of the overall population.¹³⁶ Survival sex is defined as the exchange of sex for shelter, food, drugs, or other subsistence needs.¹³⁷ Forty-eight percent of runaway and homeless youth who engage in a commercial sex activity said they did so “because they didn’t have a safe place to stay.”¹³⁸

Along with homeless and runaway youth, scholars have stated that children in the child welfare and juvenile justice systems, American Indians and Alaska natives, migrants, persons with limited English proficiency, persons with disabilities, and members of the LGBTQ+ community are especially at risk, and traffickers also target victims of sexual assault, war or conflict, or domestic violence.¹³⁹

While there seems to be broad support surrounding the notion that victims of human trafficking should not be prosecuted as a result of that status, there is great dispute over who is a victim, what *crimes* they should not be prosecuted for, and how this protection should take place.¹⁴⁰ As one scholar stated:

and Human Trafficking: As Experienced by the Youth of Covenant House New York, 1 Covenant House N.Y. 1, 6 (May 2013). This same provider found that forty-eight percent of those did so because they didn’t have a “safe place to sleep.” *Id.* at 14.

133. Beth E. Molnar et al., *Suicidal Behavior and Sexual/Physical Abuse Among Street Youth*, 22 CHILD ABUSE & NEGLECT 213, 219 (1998).

134. *Id.* at 217.

135. *Runaway Statistics: Third Party Statistics*, NAT’L RUNAWAY SAFELINE, <https://www.1800runaway.org/runaway-statistics/third-party-statistics/>, (last viewed April 1, 2019) (citing research from N. Eugene Walls & Stephanie Bell, *Correlates of Engaging in Survival Sex Among Homeless Youth and Young Adults*, 48 J. SEX RES. 423 (2011)).

136. *Human Trafficking and the Runaway and Homeless Youth Population*, NAT’L NETWORK FOR YOUTH, <https://www.1800runaway.org/wp-content/uploads/2015/05/Homeless-Youth-and-Human-Trafficking.pdf> (last visited Mar. 14, 2019).

137. *Id.*

138. *Id.*

139. TRAFFICKING IN PERSONS REPORT (2015), *supra* note 126, at 8, 196; *The Victims & Traffickers*, *supra* note 126.

140. See Augustson, *supra* note 12, at 269.

Beyond the need for changed attitudes of law enforcement and the legal system, perhaps the greatest change can be achieved when society as a whole can shift toward a greater understanding that true victims do not always look like individuals we feel comfortable labeling as victims. In fact, some victims may appear to make poor decisions, maybe even repeatedly; some victims may appear to consent to their abusers or to choose a detrimental lifestyle.¹⁴¹

The public is in great need of education and increased discourse regarding the complexities of prostitution and trafficking and the reasons why individuals are lured or coerced into and stay involved in commercial sex work. The public and law enforcement's ability to protect victims is greatly inhibited by misconceptions about what sex trafficking is, what it looks like within the United States, and who its victims are. As another scholar said, "there appears to be resistance to viewing prostitutes as victims—instead they are harmed by stereotypes and general negative attitudes suggesting that these individuals should take responsibility for their actions. Criminalization of prostitution is well-accepted, and individuals engaging in prostitution are not thought of as trafficking victims"¹⁴²

Popular images of human trafficking victims, especially sex trafficking victims, are women, usually young girls, in dark, dingy places with their own hands covering their faces or other people covering their faces.¹⁴³ These girls always almost appear bound in shackles and chains. Often, these victims are faceless.¹⁴⁴ There are numerous problems with these images. First, it feeds the popular misconception that victims of human trafficking are always kept in dark places out of sight and are kept in chains. This is damaging because it teaches the public that victims of human trafficking are not visible and lessens an individual's responsibility to act. Second, it fuels the idea that if we saw victims of trafficking, we would easily recognize them as victims and the victims would be appreciative of our help. Third, it dehumanizes the victims by not depicting them with faces. It is easier to ignore a problem when it does not have a face attached to it. Third, it further entrenches the idea that victims are nearly always young girls. Whereas, in reality, victims span all ages and both genders. As many activists in recent years

141. Anchan, *supra* note 14, at 138.

142. *Id.*

143. Type "human trafficking" into any search engine, and these will be among the most popular images.

144. *Id.*

have mentioned, men and boys are just as likely to be victims as woman and girls, and male victims are often marginalized or relegated to the sidelines of this discussion.¹⁴⁵

Additionally, this perception of trafficking is harmful because it teaches society that victims always recognize themselves as victims, are easily identified, and would accept help and leave their situation if only given the chance. In other words, that victims are trafficked only because of chains that bind them. This perception flies in the face of the reality that most victims are not bound by chains or any physical restraint and ignores the emotional and psychological complexities that are associated with human trafficking. To understand why we should help victims of human trafficking, it is first important to understand the broad range and diverse forms of sex trafficking.

There is neither one forum where sex trafficking occurs nor is there solely one way that traffickers find and gain control over their victims. To gain control of victims, traffickers “employ a variety of control tactics, including physical and emotional abuse, sexual assault, confiscation of identification and money, isolation from friends and family, and even renaming victims.”¹⁴⁶ In general, “[t]raffickers lure and ensnare people into . . . sex trafficking by manipulating and exploiting their vulnerabilities.”¹⁴⁷ Traffickers can work as lone individuals or be part of an “extensive criminal network[].”¹⁴⁸ “Their common thread is a willingness to exploit other human beings for profit.”¹⁴⁹ Traffickers also maintain control through the “use of ‘beatings, whippings, [] sexual assaults, and other torture techniques’ . . . such as threatening to harm family members.”¹⁵⁰ As Congress states, “victims [of sex trafficking] are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.”¹⁵¹ Traffickers may also gain control by promising a high-paying job, offering a loving relationship or by using physical violence or substance abuse to control victims.¹⁵² One

145. Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1146 (2010).

146. *The Victims & Traffickers*, *supra* note 125.

147. *Id.*

148. *Id.*

149. *Id.*

150. Anchan, *supra* note 14, at 138.

151. 22 U.S.C. § 7101 (2000).

152. *The Victims & Traffickers*, *supra* note 125.

judge noted that victims of sex trafficking are sometimes “drugged, kept in isolation, brainwashed by a combination of mixed affection and violation, and then sold for sex over the internet, or on the ‘track,’ in hotel rooms, and at sex parties.”¹⁵³

One way to speak about how traffickers gain control over their victims is called *grooming*. Grooming victims occurs through “extensive psychological torment; physical, verbal, and sexual abuse; facilitating dependency on drugs; brainwashing; document confiscation; and techniques used to erase the victim’s former identity, like renaming the victim or burning personal items”¹⁵⁴ Another tactic is to increase a victim’s sense of dependence on the trafficker by isolating victims from their family and friends and making them feel as if they can only rely on the trafficker.¹⁵⁵ At the same time this grooming process takes place, the trafficker also often creates rules by which the victim must comply, such as “what to wear, when to eat, when to sleep, how to walk, how to interact with [the] trafficker”¹⁵⁶ The traffickers maintain control by using physical and sexual violence as punishment for any disobedience to those rules.¹⁵⁷

Along with this psychological, physical, and sexual abuse, traffickers seek to coerce or force the victim to enter the commercial sex industry. Traffickers may begin by asking the victim to engage in sex for money so that they can “earn money for their life together and then slowly escalate” by pushing for the victim to sleep with more and more people.¹⁵⁸ The trafficker will then often institute quotas the victim must meet to avoid horrendous consequences.¹⁵⁹

This complex process of grooming leads many to compare the relationship between that of trafficker and victim to domestic abusers and domestic victims. As one scholar stated, the “culture of pimping is far removed from the glorified portrayal of pimps popularized in the mass media.”¹⁶⁰ For example, recent shows like *The Girlfriend Experience* and *The Deuce* greatly impede efforts to educate the public

153. Serita, *supra* note 10, at 641.

154. Zornosa, *supra* note 10, at 18.

155. Barnard, *supra* note 12, at 1468–69.

156. *Id.* at 1469.

157. *Id.*

158. *Id.* at 1470.

159. *Id.*

160. Serita, *supra* note 10, at 645.

about the realities of human trafficking and the realities of sexual exploitation by glamorizing pimps and the lives of prostitutes.¹⁶¹ Until these misconceptions are cleared up, prosecutors, judges, and defense attorneys will continue to misapply the laws by failing to identify victims. Legislators who are brave enough to tackle the issue of sex trafficking and propose trafficking bills will not be able to foster enough support to pass these laws.

B. Why Victims, Society, and Law Enforcement Fail to Identify Sex Trafficking Victims

Victims often do not recognize that they are victims of human trafficking or seek help because they suffer from “psychological paralysis, a condition making them believe they cannot escape prostitution despite opportunities to do so, thereby forcing them to accept their victimization.”¹⁶² Even if victims do recognize themselves as such, they are “often afraid to expose their situation, or have been threatened by violence from their traffickers if they seek help,” or worse, are incorrectly labeled *criminals*.¹⁶³ Traffickers try to instill the fear of being labeled a criminal in their victims to prevent them from seeking help from law enforcement and to make victims easier to control. Traffickers instill fear of the police into victims to maintain control, which is an easy task since many victims already are afraid of the police.¹⁶⁴ Sometimes police officers or other law enforcement officers may be involved in the trafficking ring, and traffickers tell victims that if they go to law enforcement they will be arrested or deported.¹⁶⁵ All too often, we prove the traffickers right and brand victims of human trafficking as criminals and arrest them.¹⁶⁶

161. These shows glorify the sexual exploitation of teens in the commercial sex industry (trafficking) and attempt to normalize these behaviors. For more information about why these shows and others are problematic, see *HBO Exploitation: The Deuce*, NAT'L CTR. ON SEXUAL EXPLOITATION, <https://endsexualexploitation.org/theduce/> (last visited Mar. 14, 2019) and *The Girlfriend Experience*, NAT'L CTR. ON SEXUAL EXPLOITATION, <https://endsexualexploitation.org/articles/girlfriend-experience-selling-prostitution-tv/> (last visited Mar. 14, 2019).

162. Lawrenson, *supra* note 86, at 349.

163. *Id.* at 353.

164. Cherish Adams, Note, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT'L L. REV. 201, 207 (2011).

165. *Id.*

166. See Augustson, *supra* note 12, at 642 (referencing a case where a thirteen-year-old girl was charged with prostitution).

Even after being charged, victims also frequently do not tell their stories to their lawyers:

The mistrust, shame, and psychological trauma that result from being trafficked often disable victims from telling their stories to their own lawyers. When a victim's own lawyer is not aware of the material facts, available defenses are neglected; resulting in ineffective assistance of counsel. Survivors are often encouraged to plea to a lesser charge even though they were forced or coerced to engage in the conduct that gave rise to the prosecution.¹⁶⁷

Traffickers also often instruct victims to remain silent and to enter plea deals “so that they will return to their exploiters as soon as possible; and victims comply out of fear.”¹⁶⁸ Traffickers also tell their underage victims to give the police “fake names and ages so that they will not be put into the juvenile system.”¹⁶⁹ Law enforcement consistently fails to recognize human trafficking victims, as evidenced by the number of minors who meet the definition of severe human trafficking and yet are still charged with the crime of prostitution.¹⁷⁰ This may be because it seems “‘counterintuitive to the criminal justice system’ to identify a perpetrator of a criminal act as a victim of a crime.”¹⁷¹ As Congress states:

Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.¹⁷²

167. Sarah Dohoney Byrne, *Meeting the Legal Needs of Human-Trafficking Survivors*, 52 WAKE FOREST L. REV. 379, 383 (2017).

168. Cherish Adams, Note, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Re-victimization of Sex Trafficking Victims*, 43 GEO. WASH. INT'L L. REV. 201, 207 (2011).

169. *Id.*

170. Augustson, *supra* note 12, at 642 (referencing a case where a thirteen-year-old girl was charged with prostitution).

171. Lawrenson, *supra* note 86, at 353.

172. 22 U.S.C. § 7101 (2000).

Even though Congress has explicitly stated its intention to help victims, the idea of letting a *criminal* go free is so entrenched in our society that we all too often fail to recognize the victims of human trafficking as people deserving of our help.

New York City is a great example in understanding how human trafficking and prostitution charges interact. New York City averaged around 2,400 and 2,800 arrests for prostitution or for loitering for the purpose of prostitution between 2008 and 2012.¹⁷³ In 2009, about seventy-five percent of prostitution-related arrests in New York City led to convictions and about thirty-three percent resulted in a prison sentence.¹⁷⁴ In 2011, this rose to eighty-five percent of arrests related to prostitution in New York City, leading to convictions, and again thirty-three percent resulted in a prison sentence.¹⁷⁵ These numbers led Alyssa M. Barnard to conclude that 2,036 people were convicted of prostitution-related offenses in 2009 and that 2,391 people were convicted of such offenses in 2011 in New York City alone.¹⁷⁶ Barnard used both the Department of Justice and a nongovernmental organization's estimate that "75% of prostitution is pimp controlled," or facilitated by sex traffickers to estimate that approximately 1,527 convictions in 2009 and 1,792 convictions in 2011 "were likely attributable to sex trafficking."¹⁷⁷ These numbers may be high; however, ample evidence exists to support the conclusion that even those victims of severe human trafficking are arrested and at times convicted.¹⁷⁸ This case study shows the problem with failing to recognize victims of sex trafficking. If we cannot identify victims, we cannot adequately help them.

C. Modern Sex Trafficking Is a Stain on Society and Ignoring the Problem Is Hypocritical

For those who do not personally know victims of human trafficking or are unfamiliar with the topic, it may be easy to wonder why they should even care about victims or to think that there are more pressing issues more deserving of their time. This apathy makes it difficult to

173. Barnard, *supra* note 12, at 1481–83. New York City statistics are not uncommon and are similar to other metropolitan areas.

174. *Id.*

175. *Id.*

176. *Id.* at 1481 n.124.

177. *Id.* at 1481–83 and accompanying notes.

178. *Id.*; see *supra* note 12 and accompanying text.

pass laws designed to protect victims, and if passed, makes it difficult for these laws to be applied properly. Even when individuals have crossed the first hurdle and realize human trafficking is a problem, it can be easy to think that the possibility of granting somebody amnesty who willfully and voluntarily broke the law is worth punishing innocent victims or for people to feel powerless and incapable of making any real difference. However, given the statistics that most people in the commercial sex industry are not there voluntarily, it makes much more sense to err on the side of protecting victims rather than letting a guilty individual go free. “[T]he number of trafficking victims charged and prosecuted for crimes indicates a systematic failure within the criminal justice system to recognize human trafficking and its players”¹⁷⁹ As Congress states, “[e]xisting laws often fail to protect victims of trafficking, and victims are . . . repeatedly punished more harshly than the traffickers themselves.”¹⁸⁰ Some scholars claim that evidence exists to suggest that victims are sometimes prosecuted solely so the government can also prosecute the traffickers.¹⁸¹ The Honorable Toko Serita argues that states should

develop a coordinated judicial response to the problem . . . [that] would necessarily require that judges understand: (1) human trafficking and how the courts intersect with potential victims of trafficking; (2) that prostitutes must be viewed as potential sex trafficking victims; (3) that identification of trafficking victims is extremely difficult, but is not impossible; and (4) that, once identified, trafficking victims should be provided with the necessary services to adequately address their situation.¹⁸²

Ironically, “we have created a legal dichotomy in America in which the federal government views prostituted children as victims, yet most states treat them as criminals.”¹⁸³ Furthermore, “given the undeniable intersection between trafficking and the commercial sex trade, the traditional response by the criminal justice system has not only been inadequate, but may have devastating consequences for trafficked in-

179. Allison L. Cross, Comment, *Slipping Through the Cracks: The Dual Victimization of Human-Trafficking Survivors*, 44 MCGEORGE L. REV. 395, 398 (2013).

180. 22 U.S.C. § 7101 (2000).

181. Barnard, *supra* note 12, at 1471.

182. Serita, *supra* note 10, at 657.

183. Lawrenson, *supra* note 86, at 353 (quoting *In Our Own Backyard: Child Prostitution and Sex Trafficking in the United States: Hearing Before the Subcomm. On Human Rights and the Law*, 111th Cong. 74, 3 (2010) (statement of Hon. Richard J. Durbin, U.S. Senator, IL)).

dividuals who are being revictimized by the very institutions that should be protecting them.”¹⁸⁴

Another reason we should care about helping victims of human trafficking receive justice is because penalizing victims goes against the TVPA, which is federal law, and because it is a violation of victims’ fundamental rights. In a country where we profess to be the land of the free, we have a duty to make sure we are not wrongfully criminalizing those deserving of our help. In relation to human trafficking, our society has “prioritiz[ed] the prosecution of traffickers over the protection of victims’ rights.”¹⁸⁵ One scholar stated that “[a]lmost every week, a news article covers a different story [about trafficking] that underscores our government’s preference—and the preference of society more generally—for successful human trafficking prosecutions over the recovery and rehabilitation of trafficking victims.”¹⁸⁶ These prosecutorial efforts are often called sting operations, which is a method the police use to undercover traffickers and trafficking rings.¹⁸⁷ “Whether it is coverage of a large-scale prostitution sting, or the prosecution of major sex labor trafficking enterprises, our appetite for the enforcement of criminal trafficking laws” is always on display.¹⁸⁸ Law enforcement raids, which are arguably one of the primary methods for identifying and rescuing trafficking victims are deemed successful not by how many victims have been helped but by the evidence collected and the ability to prosecute traffickers.¹⁸⁹ What is not apparent is our concern about what happens to the victims or how we are facilitating their recovery and rehabilitation.

While prosecuting perpetrators is important, it is frequently done at the cost of victims who are often arrested or detained themselves and should not supplant the urgency or desirability to help victims. Failure to help victims or to exploit them to gain their assistance in prosecuting traffickers merely revictimizes victims all over again and fails to offer appropriate support. For a country that prides itself on human rights, we should care that our own laws violate human rights by allowing human trafficking victims to be prosecuted. We should

184. Serita, *supra* note 10, at 656.

185. Emerson & Aminzadeh, *supra* note 56, at 242.

186. Zornosa, *supra* note 10, at 178.

187. See *Huge Florida Sex Trafficking Sting*, *supra* note 35; Reavy, *supra* note 35.

188. Zornosa, *supra* note 10, at 178.

189. Emerson & Aminzadeh, *supra* note 56, at 245.

also care that our Department of State judges and scores other countries annually on their efforts to prevent this exact type of miscarriage of justice and yet fails to correct it at the state level.¹⁹⁰ Thus, it is crucial that we help practitioners of the law, legislators, and society at large understand the realities of sex trafficking.

V. SUGGESTED RECOMMENDATIONS

Consequently, to properly protect victims of sex trafficking we must continue to urge states to (1) pass laws to protect victims of sex trafficking and to meet the aims of the TVPA, which is federal law, (2) reform existing laws to better meet the needs of victims of sex trafficking, and (3) teach future practitioners of the law and criminal law enforcement agencies (a) how to recognize sex trafficking victims, (b) how to ensure that no unjust charge is being brought, (c) and help victims access the laws designed to protect them. Until we correct misconceptions of victims of human trafficking, nothing will change. Thus, it is imperative for practitioners of law to take an active role in correcting these misconceptions by first educating themselves about human trafficking. Law students also need to be exposed to human trafficking. Some law schools in cities like Boston have started human trafficking clinics.¹⁹¹ While implementing human trafficking clinics may be impractical in every city, especially in cities where human trafficking is not quite as prevalent as it is in Boston, there are other ways law schools can expose law students and lawyers to the issue of human trafficking. Law students will go on to fill the positions of state and federal prosecutors and state and federal public defenders, and even judges. If we want to fill the intent of federal law and even state law, we need to make sure future lawyers and current lawyers are aware of the realities of human trafficking and are trained to identify them. Public defenders should be alerted to the reality that most people facing prostitution or other crimes pertaining to the sex industry are most likely being trafficked and they should be attuned to the defenses available in their states. Prosecutors should also be aware of this reality in their decision to press charges or not. More importantly, encouraging

190. Every year the United States Department of State grades each country on how well it is tackling the issue of human trafficking. It also grades the United States. *E.g.* TRAFFICKING IN PERSONS REPORT 29 (2014), *supra* note 15.

191. *BU Law's Human Trafficking Clinic*, BU SCH. OF L., <http://www.bu.edu/law/communications/trafficking2013.shtml> (last visited Mar. 14, 2019).

lawyers to be knowledgeable about this area of law will greatly help victims assert their rights and bring vacatur motions.

Additionally, law professors need to be more willing to team up with their associated universities to help educate students about human trafficking. Utah's Attorney General Sean Reyes spoke at a Brigham Young University and pleaded with university students to get involved in the dialog of human trafficking. As a result, the university has now hosted four annual conferences on the subject of human trafficking and how students can get involved to help prevent trafficking. This college has flown in over forty speakers from all over the country to spread awareness and these conferences alone have reached over 600 students and members of the community. Spreading awareness on this topic and the realities of the crime is the first way to fix misconceptions on the topic. Recent studies prove that more individuals are being forced into the sex industry. Thus, it is more important than ever to arm future leaders of our country with knowledge about the reality of human trafficking. These steps are not revolutionary, but merely because a step is basic does not mean it is inadequate. Too many colleges, universities, and future practitioners have failed to engage with the subject at all. Only by exposing the future legislators and practitioners of law to the realities of human trafficking will there begin to be enough support to pass adequate state laws on human trafficking and sufficient knowledge to identify victims and to apply the laws correctly. Congress has stated that "[t]he right to be free from slavery and involuntary servitude is among those unalienable rights"¹⁹² guaranteed by the Declaration of Independence. Thus, it is imperative for lawyers at the very least to be knowledgeable on the subject in order to safeguard those rights and to help pass and apply laws designed to protect these rights. By clearing up misconceptions about sex trafficking and its victims, and by providing increased training and education for legislators, the public at large, practitioners, and states will be more likely to pass laws designed to protect sex trafficking victims and to apply these laws correctly.

192. 22 U.S.C. § 7101 (2000).

VI. CONCLUSION

Given that potentially 800,000 children each year are at risk to be victims of sex trafficking,¹⁹³ it is imperative that states pass laws designed to protect children from this harm. Sex trafficking happens in every state. Consequently, no state is exempt from passing state laws designed to protect victims. For the most part, states have done a good job prosecuting traffickers, but the victims of human trafficking are not afforded adequate protection under the law. The media has also begun to frequently report on sting operations, helping spread understanding of trafficking. But media organizations rarely report on the fate of the victims uncovered in these operations. The United States purports to be the land of the free, and we judge other governments on their ability to protect victims. However, our own states have not risen to the challenge because it is difficult to face the ugly reality that modern slavery (human trafficking) exists and that it exists in our states. It is much easier to pretend it does not exist or to pretend that people engaged in the commercial sex industry are all there by choice. As this note has demonstrated, that simply is not the case. The prevalence of human trafficking is staggering, and the need for states to pass laws to protect victims of human trafficking is of the utmost importance. Passing safe harbor laws, affirmative defense laws, and vacatur laws at the state level is crucial to providing proper protection to victims of trafficking. However, until the narrative surrounding who is a victim of trafficking and how sex trafficking operates within the United States changes, these laws will continue to remain unpassed or passed in ineffective ways. To change the narrative surrounding human trafficking, individuals must educate themselves concerning who are victims of sex trafficking and who is at risk of becoming a victim. We must increase exposure surrounding this area to the public at large, but especially to future medical professionals, law professionals, law enforcement, and judges.

Danica Baird

193. See *supra* notes 126–129 and accompanying text.